

ARKANSAS SUPREME COURT

No. CR 07-834

DENNIS CALVIN WARREN
Appellant

v.

STATE OF ARKANSAS
Appellee

Opinion Delivered October 23, 2008

PRO SE APPEAL FROM THE CIRCUIT
COURT OF WHITE COUNTY, CR
2005-365, HON. ROBERT EDWARDS,
JUDGE

AFFIRMED.

PER CURIAM

In 2005, appellant Dennis Calvin Warren was convicted by a jury of delivery of a controlled substance, crack cocaine. He was sentenced as a habitual offender to 600 months' imprisonment and the Arkansas Court of Appeals affirmed. *Warren v. State*, CACR 06-507 (Ark. App. Jan. 17, 2007). Subsequently, appellant timely filed in the trial court a verified petition pursuant to Arkansas Rule of Criminal Procedure 37.1. The trial court denied the petition without a hearing, and appellant has lodged an appeal here from the order.

We do not reverse a denial of postconviction relief unless the trial court's findings are clearly erroneous. *Greene v. State*, 356 Ark. 59, 146 S.W.3d 871 (2004). A finding is clearly erroneous when, although there was evidence to support it, the appellate court after reviewing the entire evidence is left with the definite and firm conviction that a mistake has been committed. *Flores v. State*, 350 Ark. 198, 85 S.W.3d 896 (2002).

In the petition filed below and on appeal, appellant contends that the trial court erred in finding that trial counsel was not ineffective in two instances and in finding that an audio recording

introduced by the State was not fabricated. The allegations of ineffective assistance of counsel are that counsel allowed appellant to be sentenced erroneously as a habitual offender and failed to obtain a continuance of the jury trial.

Under the standard for showing ineffective assistance of counsel, appellant must prove that counsel's performance was deficient and, as a result, that appellant was deprived of a fair trial. *Strickland v. Washington*, 466 U.S. 668 (1984); *Jackson v. State*, 352 Ark. 359, 105 S.W.3d 352 (2003). There is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Noel v. State*, 342 Ark. 35, 26 S.W.3d 123 (2000). The burden is on appellant to provide facts to support his claims of prejudice. *Nelson v. State*, 344 Ark. 407, 39 S.W.3d 791 (2001) (per curiam).

In appellant's first point on appeal, he complains that he was erroneously sentenced as a habitual offender under Arkansas Code Annotated § 5-4-501(a) (Repl. 1997). He argues that two prior convictions could not be considered for enhancement because the underlying crimes were committed prior to June 30, 1993. He also contends that the portion of the habitual offender statute applied by the trial court pertains to violent felonies and not to drug convictions.

Appellant here fails to establish factual or legal support for the contention that section 5-4-501(a)(1)(A) of the habitual offender statute did not apply to enhance his sentence. Under this statute, the two requirements for sentence enhancement are that the defendant has been convicted of a felony that was committed after June 30, 1993, and that he or she had previously been convicted of more than one, but fewer than four, felonies.

The first contention advanced by appellant is that the June 30, 1993, date contained in this section applies to the prior felonies used as the basis for sentence enhancement. Under his theory,

the dates of the prior convictions here allow only one prior felony to be used for enhancement purposes, thereby precluding application of this statute to his conviction. However, we have previously held that the date of the commission of an offense being used to enhance a sentence under section 5-4-501 is not relevant. *Parker v. State*, 355 Ark. 639, 144 S.W.3d 270 (2004) (citing *Jones v. State*, 347 Ark. 455, 65 S.W.3d 402 (2002)). As the 1993 date does not apply to the felonies used for enhancement, but to the felony that is to receive an enhanced sentence, appellant mischaracterizes the language of the statute in this regard.

In addition, appellant claims that section 5-4-501(a)(1)(A) applies only to violent offenses and not to his drug-related offense, but the plain language of the statute does not contain such a provision. The statute instead applies to felonies *other* than the violent felonies enumerated in subsections (c) and (d). Ark. Code Ann. § 5-4-501(a)(1)(A)(i).

The burden is on appellant to provide facts to support his claims of prejudice, and allegations without factual substantiation are insufficient to overcome the presumption that counsel is effective. *Nelson, supra*. Appellant's wrongful description of the habitual offender statute language cannot support his claim of ineffective assistance of counsel under *Strickland*, as counsel was not deficient for failing to make an argument at trial that had no merit. *Noel, supra*. Appellant thus fails to demonstrate that the trial court erred on this point.

For the second point on appeal, appellant contends that counsel was ineffective for failing to obtain a continuance of the jury trial by submitting a proper affidavit. The record in the direct appeal shows that on the morning of the jury trial, counsel informed the trial court that she had been unable to serve a subpoena on Sharon Thorpe, appellant's ex-wife, who was also referred to as Sharon Tharpe in the record. Counsel then moved for a continuance.

In her argument in support of a continuance, counsel stated that it was appellant's belief that Ms. Thorpe was an "essential witness" for the defense.¹ Ms. Thorpe's testimony, as presented by trial counsel, would have been that Ms. Thorpe was friends with several police officers, including Lieutenant Ricky Shourd with the Searcy Police Department. Due to these friendships, Ms. Thorpe would have testified that appellant was being negatively targeted by the Searcy police after Ms. Thorpe's marriage to appellant had been annulled. The trial court denied the motion for continuance.

On direct appeal, the court of appeals did not reach the issue of whether the trial court abused its discretion by denying the motion for continuance. The appellate court held that counsel failed to present an affidavit to justify a continuance based upon a missing witnesses as required by Arkansas Code Annotated § 16-63-402 (1987).² Relying upon the language in the court of appeal's ruling, appellant contends that counsel was ineffective.

Contrary to appellant's position, failure of counsel to submit a proper affidavit in support of a continuance is not in itself evidence that counsel was ineffective. To support his allegation of ineffectiveness, appellant must demonstrate that he was prejudiced by trial counsel's actions. *Nelson, supra*.

Here, the record in the direct appeal reveals that trial counsel called Lt. Shourd as a witness for the defense. He testified that solely because of his personal relationship with Ms. Thorpe, he began an unofficial investigation into appellant's activities that eventually led to appellant's arrest. Even if Ms. Thorpe had been called as a witness, appellant did not demonstrate that her testimony

¹Appellant cites the court of appeal's opinion to bolster his argument that Ms. Thorpe was an essential witness for the defense. However, the appellate court only quoted trial counsel's statement, which merely represented appellant's characterization of Ms. Thorpe's indispensability.

²Under section 16-63-402(a), the affidavit must "show what facts the affiant believes the witness will prove and not merely show the effect of the facts in evidence[.]"

would have been more than merely cumulative to Lt. Shourd's testimony. Appellant did not meet his burden of establishing that he suffered actual prejudice as a result of counsel's failure to obtain a continuance.

In the third point on appeal, appellant contends that the trial court erred in finding that an audio recording introduced by the State was not fabricated and faults the court for allowing the recording into evidence. This argument constitutes a direct attack on the judgment, and such claims are not cognizable in a Rule 37.1 proceeding. *Camargo v. State*, 346 Ark. 118, 55 S.W.3d 255 (2001). Rule 37.1 is a means to collaterally attack a conviction and does not provide a method for the review of mere error in the conduct of the trial or to serve as a substitute for appeal. *Id.* Specifically, arguments regarding evidentiary issues are not the proper basis for a Rule 37.1 petition. *Johnson v. State*, 321 Ark. 117, 900 S.W.2d 940 (1995). Therefore, appellant fails to state a claim that is cognizable in a Rule 37.1 petition. The trial court did not err in denying appellant's petition on this point.

Affirmed.